The Legal Rights, Powers, and Obligations of Educators Regarding Student Alcohol and Drug Use

by Robert Solomon
and Sydney J. Usprich

Second Edition
Addiction Research Foundation 1991

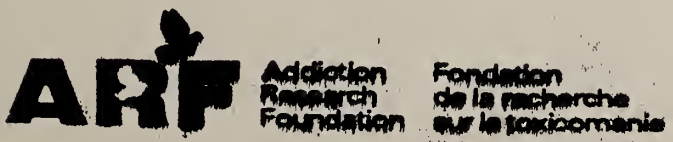

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Table of Contents

1 *Introduction*

This document is intended as a companion to *Alcohol and Drug Policies: A Guide for School Boards*. Its purpose is to provide the legal information required for educators to develop a comprehensive policy for dealing with student alcohol and drug use. School boards, principals, and teachers have a broad range of rights, powers, and obligations which are derived from various sources. Taken together, these sources give educators ample legal authority to implement the three components of the model policy. The real challenge for educators is to ensure that this authority is used wisely in balancing the goals of the three components, while maintaining the student and parental support that is essential to the overall success of the policy.

The following three sections of this companion document examine the *Education Act*,[1] the *Trespass to Property Act*,[2] and the *Criminal Code*.[3] Separate rights, powers, and obligations exist under each Act. Although a particular Act may not authorize a teacher's or principal's specific action, either or both of the other Acts may do so. Consequently, the entire text should be read before reaching any conclusions about what one may or may not be empowered to do.

Following the review of the three Acts, we discuss educators' obligations for recordkeeping, confidentiality, and disclosure. The focus then shifts to a detailed examination of one of the leading cases in this field. The final section summarizes the conclusions that can be drawn from this material.

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2 *The Education Act*

The Education Act *is a complex piece of legislation. The provisions most relevant for our purposes are drafted in broad terms that provide boards, principals, and teachers with substantial authority and responsibility. Until recently, these provisions were rarely litigated. Moreover, the cases that did go to court suggested that judges were willing to give educators a relatively free hand in operating the school system.*

General duties of teachers and principals

The *Education Act* imposes a variety of obligations on teachers[4] and principals.[5] It also regulates the method and content of instruction, the conduct of principals, teachers and students, and the learning environment in the school. Both teachers and principals are required to set an example for students and to instill in them "the highest regard for truth, justice,... sobriety, industry, frugality, purity, temperance, and all other virtues".[6] Through various provisions, the Act also imposes a general duty on teachers and principals to establish a positive learning environment and to encourage students in the "pursuit of learning".[7] The Act and Regulations also indicate that educators have a general obligation to preserve the safety and health of students.[8]

These broad duties suggest that educators have obligations to respond to student alcohol and drug use. The three components of the comprehensive policy appear to be warranted, whether one focuses on an educator's responsibility to instill regard for sobriety and temperance, to establish a positive learning environment or to protect student health and safety.

Duty of principals and teachers to maintain order and discipline

Both principals and teachers are charged with responsibility for maintaining order and discipline.[9] Principals are ultimately accountable for ensuring order and discipline in the school, and they are expected to establish appropriate guidelines.[10] Teachers, under the direction of their principal, are required to maintain order and discipline in the classroom and on school premises.[11]

Pupils have a corresponding duty to exercise self-discipline and to accept a principal's or teacher's disciplinary actions as those of a kind and firm parent. This duty applies to a pupil's conduct at school, any school-sponsored event or while travelling on a school bus.[12]

The concept of order and discipline is broad enough to support school policies prohibiting any unlawful conduct as well as any conduct that might pose a risk of injury to students, staff, or school property.[13] These provisions should also enable principals and teachers to take whatever steps are reasonably necessary to maintain an appropriate learning environment.[14] This may entail prohibiting students from coming to school or school events in an intoxicated condition. It may also include a general prohibition against bringing any alcohol, drugs, or other potentially intoxicating substances onto school property, whether or not the student's conduct is lawful. For example, a school board could prohibit any student, even those over 16, from bringing tobacco onto school property.

"Through various provisions, the Act imposes a general duty on teachers and principals to establish a positive learning environment and to encourage students in the 'pursuit of learning'."

Power to protect, inspect, and preserve school property

The *Education Act* and its Regulations grant school boards and principals extensive powers to deal with, protect, and inspect school property. Some of these powers are custodial in nature, focusing on the repair and maintenance of school property.[15] Nevertheless, there are other provisions that grant school boards and principals virtually all the powers of other property owners.[16] These provisions appear broad enough to empower boards, principals, and teachers to search school lockers or desks. It seems appropriate for a school board to take reasonable steps to ensure that its property is not used for illegal purposes or in violation of its own alcohol and drug policies.

Nevertheless, three notes of caution are warranted. First, the right to search a locker would not, in and of itself, justify searching the student's property in the locker. Similar concerns may be raised about interfering with a lock belonging to the student. However, several Canadian cases suggest that school officials who reasonably suspect a student of violating the law or the school rules may search that student and his or her belongings under their right to maintain order and discipline.[17] Presumably, the courts would also permit school officials to remove a student's lock in such circumstances, given the courts' broad interpretation of the order and discipline provision.

Second, the arbitrary use of this power would inevitably generate administrative and legal challenges.[18] Third, regardless of the outcome of such challenges, these tactics would probably alienate the student body, thereby undermining the other components of the model policy.

Consequently, this search power should be used with restraint. It is advisable for Boards to establish a locker search policy that is distributed to both students and parents. In that policy, a Board could specifically reserve the right to search any locker if there was reason to believe that it contained any prohibited substance or object.

Power to compel attendance

The *Education Act* requires children between the ages of 6 and 16 to attend school unless they fall within one of the listed exclusions.[19] Parents and guardians have a corresponding duty to ensure that their children attend school; a breach of this duty constitutes a provincial offence.[20] Similarly, a child may be prosecuted under the Act for failing to attend school.[21] The Act also authorizes attendance counsellors to take custody of truants in some situations and return them to their parents or the school.[22] Moreover, principals are authorized to suspend a child for persistent truancy.[23]

When a pupil returns after being absent, a parent of the pupil or the pupil if he or she is 18 or older, is required to provide a written or oral explanation as directed by the principal.[24] This provision coupled with attendance records and other information, might assist schools in identifying students with alcohol or drug problems.

Power to refuse entry

Principals can deny entry to anyone whose presence on school property would in their judgment be detrimental to the physical or mental well-being of the students.[25] A principal could use this power to prevent the entry of anyone he or she believed was intoxicated, was providing alcohol or drugs to students, or was in possession of alcohol or drugs in violation of school policy.[26] Although it may be appropriate to deny entry, for example, to a rock group that openly advocates violating the drug laws, entry should not be denied to outsiders simply because their views on a particular issue differ from that of the school administration.[27]

"A principal could use this power to prevent the entry of anyone he or she believed was intoxicated, was providing alcohol or drugs to students, or was in possession of alcohol or drugs in violation of school policy."

Power to suspend or expel students

The *Education Act* gives educators sweeping authority to suspend and expel students for a broad range of misbehaviour. A principal may suspend a student for a fixed period of time, not exceeding the limit set by the board, for "persistent truancy, persistent opposition to authority, habitual neglect of duty, the wilful destruction of school property, the use of profane or improper language, or conduct injurious to the moral tone of the school or to the physical or mental well-being of others in the school".[28] This last ground for suspension is broad enough to encompass any violation of a school's alcohol and drug policy, whether or not the student's conduct is illegal.[29]

As soon as a principal suspends a student, the student and his or her parents must be notified in writing of the reasons for the suspension. They must also be informed of the appeal procedures. In addition, the principal must write to the student's teachers, the appropriate attendance counsellors and supervisors, and the board.[30] If the suspension is based on student conduct that is an offence covered by the *Young Offenders Act*, it could be argued that the letters and proceedings constituted a technical violation of that Act's prohibition against publishing information identifying young offenders.[31] This potential conflict has not yet been resolved.

The student's parents or guardians, or the student if he or she is an adult, have a right to appeal the suspension. The board is then required to convene a hearing to resolve the matter.[32] Even if there is no appeal, the board may remove, confirm or modify the suspension, and may expunge the record of it.[33]

The board may expel any student if "his conduct is so refractory that his presence is injurious to other pupils".[34] Although narrower than the grounds for suspension, the criteria for expulsion are vague. A serious infraction or repeated infractions of a school's alcohol and drug policies might well constitute grounds for expulsion.[35] The Act provides detailed procedures that must be taken to initiate and convene an expulsion hearing.[36]

Section 22(5) of the Act gives a board discretion to readmit students who have been expelled. Presumably a board could also establish conditions for readmission. For example, it appears reasonable that a student who has been expelled for repeatedly coming to school intoxicated be required to accept a referral for treatment as a prerequisite for admission.

Students and their parents can also challenge a suspension or expulsion order in the courts. Until recently, the courts usually upheld the school's decision unless there was a clear error.[37] But as the following case illustrates, the courts now appear to be more critical of the substantive grounds for suspension and expulsion orders.

Re Peel Board of Education and B[38] arose from an out-of-school incident in which six male students were charged with abducting and sexually assaulting a female student. On learning of the charges, the principal suspended the students and the Board subsequently sought to initiate expulsion proceedings. Before doing so, the Board applied to the court to determine if such proceedings would violate section 38(1) of the *Young Offenders Act*[39] *(YOA)*. It prohibits publishing by any means a report that would result in disclosing the name or identity of a young person who has or is alleged to have committed an offence governed by the Act. The decision raises two important issues.

First, the judge was extremely critical of the principal's and Board's "peremptory" conduct. The mere fact that a student is charged with an offence does not establish that he or she committed the alleged act. Consequently, the principal and Board were not justified in taking any disciplinary action against the students, let alone expulsion proceedings. In the judge's words: "Had the principal not jumped to the conclusion that the students were guilty he would have had no basis for ordering their suspension. He had no

other information on which to base his conclusion..."[40]

Second, the judge interpreted section 38(1) of the *YOA* very broadly. The judge accepted that the Board had no intention to invade the student's privacy and that it would act in good faith to preserve the secrecy of the expulsion proceedings. Nevertheless, he stated that the holding of the expulsion hearing would fuel the existing rumours and that any unfavorable result in the hearing would inevitably lead to the students being identified. Consequently, the judge prohibited the Board from proceeding because it would violate section 38(1).[41]

This aspect of the *Peel* decision is problematic. If this broad interpretation of s. 38(1) is accepted, an educator could not discipline a student for any school infraction that also happened to be governed by the *YOA*, even if the police had no interest in pursuing the matter.[42] Thus, schools would be precluded from disciplining students for petty vandalism, minor thefts, any fighting, or a violation of the federal tobacco legislation prohibiting underage possession. This interpretation also stands in sharp contrast to that adopted in other cases,[43] including the Court of Appeal decision in *R. v. J.M.G.*,[44] which will be discussed in detail later in the text.

The offence in *Peel* was not committed on school premises and did not constitute a school infraction. It is unclear whether the result would have been different had the offence been committed at school and involved a violation of the school rules. Perhaps, it is on this basis that the courts will ultimately resolve the conflict between *Peel* and other cases.

Aside from the slight uncertainty created by *Peel*, educators have ample authority to suspend or expel students for violations of school alcohol and drug policies. The challenge for school boards is to ensure that these powers are used with restraint, in a manner that does not undermine support for their other alcohol and drug initiatives.

3 *The Trespass to Property Act and Related Issues*

The Trespass to Property Act (T.P.A.)[45] *specifically states that school boards and those acting on their behalf have the same rights as other "occupiers" of land.[46] By making it a provincial offence to trespass, the Act creates a sanction that "occupiers" can use to control who may enter and remain on their property.*

Power to deny or limit entry

Anyone who enters, without the occupier's express consent, premises where entry is prohibited, or who remains after being directed to leave, is guilty of trespassing and may be fined up to $2,000.[47] An occupier may prohibit entry by posting signs or by giving written or verbal notice.[48] It also may be presumed that entry is prohibited from the way in which the property is enclosed.[49] An occupier may permit entry for some purposes or under specified circumstances, but prohibit entry in all other situations.[50]

These provisions do not apply to a person who has a legal right to enter.[51] Since students have an obligation to attend school until they are 16 and have a general right to a public education,[52] they have a legal right to enter school property.[53] Presumably, this right is conditional upon the student complying with reasonable rules of conduct.[54] Consequently, a board may only be able to prohibit or restrict student entry if it has some justification.

It appears reasonable for a board to prohibit entry by anyone who is violating the school's alcohol and drug policies. Such a restriction is compatible with a school's educational responsibilities[55] and does not unduly limit a student's right of entry. Considerable care should be taken in formulating procedures to enforce these entry policies. For example, a board might permit only its own students to attend school dances and other social events. Provided the policy was made known in advance, it might be acceptable to require students entering a school dance to open their purses, knapsacks and similar belongings to ensure that they do not contain alcohol. Nevertheless, a school board could not justifiably require students to agree to such a search policy as a condition for attending classes, because students have a legal right to attend.[56] Regardless of the entry policies it adopts, a board should distribute copies of them to students and parents, and post copies prominently on the school grounds.

Right to arrest

A police officer, an occupier and any person acting on an occupier's behalf may arrest without a warrant anyone on the property who they reasonably believe is trespassing.[57] The arrest is lawful even if the person arrested was not in fact trespassing. The Act requires a private citizen who arrests a trespasser to call the police and hand over the suspect to them.[58] Once the police are involved, the occupier cannot control how the case will be handled. For example, a principal could not stop the police from laying a trespassing charge against a student who had been handed over to them under the Act.

"A police officer, an occupier and any person acting on an occupier's behalf may arrest without a warrant anyone on the property who they reasonably believe is trespassing."

Citizen's arrest and the *Canadian Charter of Rights and Freedoms*

Once school officials arrest, detain or search a student under the *T.P.A.* or other penal legislation, they must comply with the *Charter.* For example in *R. v. Lerke,*[59] the staff of a tavern arrested the accused for trespassing and, in searching him, found marijuana. The police were called and Lerke was charged with possession under the *Narcotic Control Act.*[60] The Court of Appeal held that arrest and search are government functions to which the *Charter* applies, whether the person making the arrest is a police officer or a private citizen. Consequently, a suspect who is arrested or searched by a private citizen is entitled to a broad range of rights under the *Charter,* including the right not to be subject to unreasonable search and seizure;[61] the right not to be arbitrarily detained or imprisoned;[62] the right to be informed of the reasons for the arrest;[63] the right to retain and instruct counsel;[64] and the right to be informed of the right to counsel.[65] Pursuant to section 24(2) of the *Charter,* evidence seized in violation of the *Charter* must be excluded, if its admission into evidence would, in all the circumstances of the case, bring the administration of justice into disrepute.[66]

The Court of Appeal held that the staff had lawfully arrested Lerke, but then violated section 8 of the *Charter* which prohibits unreasonable search and seizure. Consequently, the marijuana which the staff seized was excluded from evidence under section 24(2), and Lerke was acquitted. As we shall discuss in chapter 6, school officials acting under the *Education Act* may avoid some of the *Charter* problems that other private citizens face in relying on the *T.P.A.*, the *Criminal Code* or other penal legislation.[67]

Right to use reasonable force to eject trespassers and to protect property

The *Criminal Code*[68] and the common law[69] give occupiers the rights to use reasonable force in ejecting trespassers. Except in the case of a violent intruder, an occupier cannot use any force until after the trespasser has been given an opportunity to leave peacefully. If a trespasser refuses to leave after being asked to do so, an occupier can physically remove him or her.[70] Nevertheless, there are two major limits on the right to eject trespassers. First, an occupier cannot use deadly force or force likely to cause serious bodily injury simply for the purpose of ejecting a trespasser.[71] Rather, an occupier should call the police and tolerate the presence of the trespasser until they arrive. Second, an occupier cannot eject a trespasser if doing so would foreseeably endanger the trespasser.[72] For example, a tavern was held civilly liable for ejecting an extremely intoxicated patron who was subsequently hit by a car while attempting to make his way home.[73]

This second exception is important in formulating school policies to deal with students who are intoxicated. Since educators are considered to have a special relationship with students, they would be required to take greater care than other types of occupiers.[74] Consequently, it would be inadvisable simply to turn away an intoxicated student at the door of a school dance, especially if there was reason to believe that the student may be driving. In these situations, a school's primary concern should be with the student's safety and that of others who may be foreseeably endangered. The courts would probably require school officials to take reasonable steps to protect the student in this situation.[75] This may involve calling the student's parents or another responsible adult, arranging to have the student taken home, and perhaps even calling the police if there was no other way of preventing the student from driving.[76]

"It would be inadvisable simply to turn away an intoxicated student at the door of a school dance, especially if there was reason to believe that the student may be driving."

If despite the school staff's efforts an intoxicated student left and was injured, the staff would not be held liable. Nor would teachers be expected to endanger themselves by attempting to subdue an intoxicated student who physically threatened anyone who tried to stop him.

The *Criminal Code* and the common law give occupiers the right to use reasonable force to protect their property.[77] An occupier should attempt to resolve the issue peacefully before using any force. In no circumstances can deadly force or force likely to cause serious bodily injury be used simply to protect property.[78] While it may be appropriate for an educator to use physical force in an effort to protect students from injuring themselves or others, it is far harder to justify using force simply to protect property.

Consequences of committing trespass

As indicated, a person convicted of trespassing may be fined up to $2,000 under the *T.P.A.*[79] With the permission of the prosecutor and the occupier, the court may also issue a judgment of up to $1,000 against the trespasser to compensate the occupier for his or her damages.[80] As an alternative, an occupier can bring a common law tort action against the trespasser, in which case there is no limit on the size of the damage award.[81] If the crown prosecutor decides not to proceed with charges under the Act, the occupier can initiate a private prosecution. In addition to any fine, the convicted trespasser may be required to compensate the occupier for the costs of bringing the private prosecution.[82]

"The Criminal Code and the common law give occupiers the right to use reasonable force to protect their property."

4 *The Criminal Code*

The Criminal Code *grants private citizens broad powers to arrest without a warrant. These powers are similar in scope to those of the police. As well, the* Code *authorizes all individuals to use reasonable force in self-defence and the defence of others. Teachers, parents and those standing in the position of a parent are granted special authority to use reasonable force to discipline a child. Finally, the* Criminal Code *protects those exercising legal authority from both criminal and civil liability, provided they act on reasonable grounds and use only reasonable force.*

A private citizen's right to arrest without a warrant

The *Criminal Code* authorizes private citizens to make arrests without a warrant in three situations, two of which are relevant in the school context.[83] First, a private citizen may arrest any person whom he or she finds apparently committing an indictable offence.[84] The fact that the suspect was not actually committing the offence at the time will not render the arrest unlawful. The term indictable offence[85] includes a broad range of *Criminal Code* offences, all of the common federal drug offences and all of the federal drinking and driving offences. Consequently, school officials can arrest without a warrant any student who is found apparently committing a federal drug offence or a federal drinking and driving offence.

Second, an owner or person in lawful possession of property, or a person acting on his or her behalf, may arrest without a warrant any person found apparently committing a criminal offence "on or in relation to that property".[86] The term criminal offence includes all offences under federal jurisdiction.[87] This second power to arrest without a warrant is broader than the first because it includes offences which can only be tried by summary conviction, such as causing a disturbance[88] and unlawful possession of tobacco contrary to the federal *Tobacco Restraint Act*.[89] It should be emphasized that this power to arrest is limited to federal offences committed on or in relation to the property.

The *Criminal Code* requires private citizens who make an arrest to "forthwith deliver" the suspect to the police.[90] Once the police are involved, they are responsible for determining how the matter will be handled. For example, the police may charge a student with assault for participating in a minor schoolyard scuffle, despite the principal's and teacher's requests that the matter be resolved informally.

Search of a suspect as an incident of lawful arrest

In the absence of specific statutory authority, there is no general right to search an individual until after he or she has been lawfully arrested.[91] Following an arrest, an officer or private citizen may search the suspect, his or her belongings, and the area within his or her immediate control for evidence of the offence or for weapons.[92] If other incriminating evidence is found, it may be seized and additional charges may be laid.

In order to invoke this search power, school officials must formally arrest the student, and they are then required to call the police.[93] Unless there is concern about a weapon or destruction of evidence, it is advisable to let the police search the student. Undertaking personal searches may prove embarrassing to both school officials and students. Moreover, personal searches,

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the seizure of evidence, and the questioning of suspects pose complex legal issues which often generate legal challenges.[94]

Self-defence and the protection of others

The *Criminal Code* authorizes individuals to use reasonable force in self-defence.[95] In order to invoke this defence, an individual must have been assaulted.[96] The offence of assault includes not only hitting an individual, but also threatening or attempting to do so.[97] Someone who makes a reasonable and honest mistake as to the need to use force may still invoke the defence.[98]

A person asserting the defence must also not have used more force than was necessary.[99] For example, punching a student in response to his or her verbal threat may constitute excessive force and negate the defence. But a teacher who attempts to restrain a student and inadvertently causes him or her to fall and break an arm may be viewed as having used only reasonable force. The courts assess the amount of force used and not necessarily the results of its application.[100] Force that is likely to cause death or serious injury can only be used if a person reasonably believes that it is necessary for protection from death or serious harm.[101] Similar principles apply to using force to protect others.[102]

Right to use force to prevent the commission of an offence

The *Criminal Code* authorizes individuals to use force to prevent the commission of many federal offences.[103] In practical terms, this right applies to virtually any criminal offence that "would be likely to cause immediate and serious injury" to any person or property.[104] These powers might authorize school officials to use as much force as was reasonably necessary to prevent an intoxicated student from driving. This section would also provide additional authority for school officials to prevent assaults, destruction of school property, drug offences, and a wide range of other crimes.

Defence of discipline

Section 43 of the *Criminal Code* states that "every school teacher, parent, or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child...who is under his care, if the force does not exceed what is reasonable under the circumstances". As the following case illustrates, Canadian courts traditionally interpreted this provision as authorizing physical punishment for violation of school disciplinary rules.[105]

In *R. v. Haberstock*, three pupils were thought to have called the vice-principal names as they were leaving on a Friday afternoon.[106] The following Monday morning the vice-principal confronted the boys in the schoolyard and slapped each of them in the face. Reversing the trial judgment, the Court of Appeal acquitted the vice-principal of assault. The Court simply assumed that this summary use of corporal punishment served a corrective function and was therefore justified under section 43. Even though one of the pupils may have been innocent, the Court held that the vice-principal was justified because he honestly believed that the child had participated in the incident.

It is most unlikely that the result would be the same if the case came to court today. There have been significant changes in attitudes towards the use of corporal punishment in the school system, as reflected by the increasing number of school boards that have prohibited or restricted the use of force. Public and judicial attitudes also appear to be changing. These changes have been coupled with apparently sharp increases in the number of educators that are being charged with assault and sexual assault.

In a 1984 case involving the use of force to discipline a mentally retarded adult, the Supreme Court of Canada stated that section 43 had to be strictly interpreted and applied.[107] In affirming the residential counsellor's conviction for assault, the Court emphasized that force can be used only to benefit the student's education. Quoting earlier authority, the Court stated that the power of correction can be used

"Section 43 of the Criminal Code states that 'every school teacher, parent, or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child...under his care, if the force does not exceed what is reasonable under the circumstances'."

only "in the interests of instruction" and that "any punishment...motivated by arbitrariness, caprice, anger, or bad humour constitutes an offence punishable like ordinary offences".[108]

These recent developments alone should discourage school officials from relying upon the *Criminal Code* defence of discipline. Moreover, the validity of section 43 will probably be challenged under the *Charter*.[109] Finally, this use of force will probably undermine the co-operative atmosphere that is essential to the successful implementation of the preventive and intervention components of a comprehensive student alcohol and drug policy.

Protection from criminal and civil liability

In addition to authorizing arrests and other enforcement procedures, the *Criminal Code* protects those who act under legal authority. Section 25(1) states that everyone who is authorized or required by law to do an act is, "if he acts on reasonable grounds," justified in doing that act and in "using as much force as is necessary for that purpose". For example, school officials who are lawfully arresting a student for a drug offence would be justified in using as much force as necessary to subdue the student. The courts have held that the term "justified" means protected from both criminal charges and civil lawsuits.[110] It should be noted that common law defences would also provide protection from civil liability in these situations.

A cautionary note

Despite the breadth of these criminal powers, it is prudent for educators to avoid making arrests unless it is necessary to protect someone from injury. The law is complex, the legality of an arrest may turn on technicalities, and the suspect may physically resist. Staff should make every effort to resolve confrontations peacefully, without invoking their formal legal powers. If arrest appears to be unavoidable, the safer course is to call the police because they are professionally trained to handle such matters and possess broader powers. Apart from the potential legal problems, the use of arrest powers is inconsistent with a teacher's educational mandate. A heavy-handed resort to these powers or outside authority may unnecessarily alienate students.

"The use of force will probably undermine the co-operative atmosphere that is essential to the successful implementation of a comprehensive student alcohol and drug policy."

5 *The Recordkeeping, Confidentiality, and Disclosure Obligations of Educators*

Concepts of confidentiality and privilege

When the term "confidentiality" is used in a legal context, it refers to the obligation to refrain from *willingly* disclosing any information that has been received in confidence and not to situations in which a person is compelled to disclose information by a court or by legislation.[111] Thus, educators who disclose confidential information in reporting suspected child abuse as required by the *Child and Family Services Act*[112] are not in breach of their confidentiality obligations.

A confidentiality obligation may be imposed on a person by statute. For example, educators are required by section 237(1) of the *Education Act* to maintain the secrecy of the information in the Ontario Student Record (OSR).[113] As well, a confidentiality obligation may be assumed by any person who promises to maintain confidentiality.[114] Finally, even in the absence of a statute or an undertaking, a court may simply infer that a confidentiality obligation arises from the nature of the relationship between the parties.[115]

An individual who breaches his or her statutory duty to maintain confidentiality may be prosecuted under the relevant statute.[116] As well, the person whose confidence is breached may be able to recover damages in a civil suit[117] and may initiate disciplinary action against the offending parties, if they have breached professional rules.[118]

The term "privilege" refers to the right to refuse to disclose confidential information even when faced with a court order or when giving testimony.[119] Traditionally, the only professional relationship to which privilege applies is that between solicitor and client.[120] Other individuals, such as doctors and their patients, may request the court to have their confidential communications exempted from compulsory disclosure in legal proceedings.[121] The courts have been reluctant to grant privilege to such communications. If the information has a bearing on the case, the courts will usually rule that the interests of justice outweigh the importance of maintaining confidentiality and will require disclosure.[122]

As we shall discuss, a great deal of the information educators receive is confidential but very little is privileged. Consequently, it is important that school officials accurately describe to students the limits of confidentiality in counselling and treatment situations. Moreover, school officials would be well advised to adopt a working assumption that they and their records may one day be examined in open court.

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Recordkeeping, confidentiality, and privilege under the *Education Act*

(a) Recordkeeping

The recordkeeping provisions of the *Education Act* are complex and technical. While it is possible to resolve most matters, some issues remain unclear. Moreover, the Ministry's new recordkeeping guidelines[123] came into force on January 1, 1991 and amendments that would alter the key provision are currently before the legislature.[124] Consequently, this should be viewed as an area in which the law is in a state of flux.

The *Education Act* requires a principal to maintain an index card and OSR for each student enrolled in the school. The index card remains at the school and the OSR is transferred when the student moves to another school.[125] Apparently, there is no express provision that would prevent educators from keeping additional types of records.[126]

The OSR is comprised of five items: a record folder, an Ontario transcript if the student is in secondary school, report cards, accumulated French and Native instruction as a second language, and a documentation file.[127] Subject to one exception,[128] school boards have discretion to determine what will be included in the documentation file. Typically, it contains name changes, custody orders, referrals, and individual health, education and psychological assessments.[129]

One unresolved issue is the most appropriate way to record disciplinary matters. Regulation 271, s. 2(3) indicates that a principal may place in the OSR any information he or she believes will be "beneficial to the teachers in the instruction of the student". Moreover, section 237(13) of the Act states "nothing in this section prevents the use of a record ... for the purposes of a disciplinary proceeding". It could be argued that both provisions would permit an educator to record in the OSR disciplinary infractions involving the school's alcohol and drug policy. The fact that a student may have an alcohol or drug problem may well be relevant to his or her instruction. Similarly, knowing that a student had previously violated the school's policy is important in properly responding to the student's current disciplinary infraction.

Nevertheless, Regulation 271, section 30(1) expressly states that an OSR cannot contain any information that discloses a contravention or alleged contravention of offences coming under the *Young Offenders Act* or Part V-A of the *Provincial Offences Act*. This prohibition is also restated in s. 9 of the Ministry of Education, "Ontario Student Record (OSR) Guidelines". The decision in *Re Peel Board of Education and B*,[130] previously discussed in Chapter 2 under "Power to suspend or expel students", provides further support for this position. Finally, regardless of the technical legal merits, there is a legitimate need to protect students from the unwarranted stigma that may arise from a criminal conviction or even an allegation of criminal behaviour.

In light of this unresolved conflict in authorities,[131] it is probably best not to include infractions of the school's alcohol and drug policy in the OSR.[132] Nevertheless, some records of such infractions should be maintained, albeit not in the OSR. This information is important in identifying students who may be experiencing alcohol and drug problems, in protecting student health and safety, in maintaining order and discipline, and in appropriately disciplining students who have previously violated the school's policies. As indicated, there does not appear to be anything preventing educators from maintaining a separate set of disciplinary files.[133] It should be limited to factual information, concerning violation of the school's disciplinary policies.

Given the current state of the law, it is impossible to provide a more definitive response. Nevertheless, the proposed approach attempts to strike a balance between the school's need for adequate disciplinary records and the students' legitimate educational and privacy concerns.

(b) Confidentiality and access

The *Education Act* provides that teachers, principals, and other school officials have access to OSRs, but that they must preserve secrecy.[134] Unless otherwise stated by the Act, this position precludes willing disclosure of the contents of the OSR without the written consent of the student, or of the parents or guardians if the student is a minor.[135] The Act also gives all students the right to examine their OSR. Parents or guardians are entitled to examine their child's record only if the child is a minor.[136] Students and their parents or

guardians may request that the principal correct any inaccuracies in the OSR[137] and remove any information that is not conducive to improving the student's instruction.[138]

Unless the appropriate written consent is provided, school officials must refuse requests for information from an OSR. Even a police request must be denied.[139] Similarly, a teacher could not disclose to the parent of an adult student any information contained in the student's record without the student's written consent.[140]

(c) Privilege

The *Education Act* severely limits how any information contained in the OSR may be used. It provides that the record is inadmissible in any trial, inquest, inquiry, examination, hearing, or other proceeding except for the purpose of establishing the record's existence.[141] Although this provision suggests that the record is privileged from disclosure in any legal proceeding, the courts have greatly narrowed its impact. This issue was addressed in *R. v. B.*, a case in which a 16-year-old was charged with the murder of an elderly woman.[142] The Court concluded that there was a conflict between the *Canada Evidence Act*, which permitted the admission of the record, and the *Education Act*, which prohibited admission. In admitting the student record, the judge stated that the court must "accept the direction and authority of federal legislation".[143] Moreover, the Court held that, despite the provisions of the *Education Act*, the school officials were required to testify.[144]

Even in matters within provincial jurisdiction, the courts may rule that the interests of justice require the admission of the student record. For example, a student's record may be important in proceedings brought by the Children's Aid Society to remove a child from his or her abusive family situation.[145]

(d) The handling of other confidential information

Educators may be privy to confidential information that is not contained in a student record. Generally speaking, if a student provides information in confidence or if an educator agrees to maintain confidentiality, the information must not be willingly disclosed without the student's permission. For example, if a student seeks alcohol or drug counselling that is being offered on a confidential basis, the counsellor cannot willingly pass this information on to any other school officials or to the student's parents. It would appear that a school board can offer counselling services on a confidential basis to a minor, provided the minor is capable of understanding the nature of the service. If the counsellor thinks the student's family should be involved, he or she may ask the student for permission to involve them. A school board could choose not to offer alcohol or drug counselling services without parental approval. Regardless of the specific policies adopted, school officials must honour the confidentiality commitments they make.

"If a student seeks alcohol or drug counselling that is being offered on a confidential basis, the counsellor cannot willingly pass this information on to any other school officials or to the student's parents."

(e) The Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)

This Act,[146] which came into force on January 1, 1991, serves basically three goals. First, it grants the public a general right of access to all non-personal information recorded by municipal institutions, subject to stipulated exceptions.[147] Second, the Act protects the privacy of individuals by limiting the right of institutions to disclose personal information.[148] Third, it grants individuals a right to review and challenge personal information that municipal institutions have recorded about them.[149] While the goals are clear, the specific provisions are extremely complex.[150]

The Act does not apply to all forms of information, but generally is limited to a "record". This term is defined as "any record of information, however recorded,

whether in print form, on film, by electronic means or otherwise."[151] Apparently personal observations that have not been documented do not constitute a "record".[152] Consequently, a teacher who witnessed an intoxicated student stagger out of a school dance would not be subject to the provisions of the Act. Nor is it clear whether the Act would extend to personal notes that staff made which were not part of the institution's records. Nevertheless, the OSR, disciplinary records and other official documentation created pursuant to the *Education Act* would be subject to the *MFIPPA*.

As indicated, if a record contains general information, the public has a basic right of access that is subject to numerous specific exceptions.[153] For example, these exceptions would permit a principal to refuse disclosure of private deliberations, advice of employees or consultants, information relating to an internal or police investigation, or legal advice.[154] Moreover, a principal must refuse to disclose confidential information received from a federal or provincial government agency.[155]

However, of greater concern for our purposes are those provisions of the Act governing "personal information". This term is defined to include any educational, medical, psychological, or criminal history information, as well as the address, telephone number or family status of an identifiable individual.[156] As a general rule, personal information cannot be disclosed to anyone other than the person to whom it relates, without that person's written consent or request.[157] The rights conferred in the Act can be exercised by anyone 16 years of age or older, or by a person who has lawful custody of a person under 16.[158]

This general prohibition against disclosure is subject to a number of exceptions. For example, a principal may disclose a record containing personal information in compelling circumstances affecting an individual's health or safety.[159] Personal information may also be disclosed if that disclosure is specifically authorized by federal or provincial law.[160] Consequently, a principal would not violate the *MFIPPA* if he or she was complying with the *Education Act* in sending out suspension notices, contacting the medical officer of health, or granting parents access to their minor child's OSR. Disclosure of personal information is permitted, as well, if it would not constitute an "unjustified invasion of personal privacy".[161] In any event, section 16 of the Act permits disclosure of general or personal information, if "a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption" from disclosure.

Part II of the Act creates a somewhat parallel set of provisions covering the institutional or inter-agency use of records.[162] In addition to the exceptions already noted, an institution may disclose personal information, for the purpose for which it was obtained or a consistent purpose, to employees of the institution who need the information to perform their duty, to a law enforcement agency, or in compassionate circumstances to notify next-of-kin of the death or injury of the individual.[163]

Individuals have a general right of access to records that institutions have concerning them.[164] However, the general right is subject to most of the disclosure exemptions that apply to requests from third parties.[165] An individual has a right to request that any inaccuracies in the institutional records be corrected.[166] The Act requires institutions to safeguard the confidentiality of their records and to ensure that the information is current.[167] There are elaborate provisions for resolving disputes about access, disclosure and the accuracy of the records.[168]

The *MFIPPA* complicates the law relating to school records, and adds new uncertainties. Complying with it may be quite time consuming and costly. Nevertheless, it does not significantly limit a school's ability to respond to alcohol and drug concerns. Nor does it pose any major obstacle to the implementation of the three components of a comprehensive alcohol and drug program.

Duty to report crime

Unless required by statute, individuals have no general legal obligation to report federal or provincial offences, to assist the police or to answer police questions.[169] With the exception of treason, the *Criminal Code* does not require citizens to report federal crimes.[170] There are several provincial reporting obligations, but few deal with penal matters. Thus, educators are rarely required to report offences. Nevertheless, there is nothing preventing educators from reporting crimes to the police, provided the information was not obtained in confidence. Although a person may lawfully refuse to answer police questions, lying or consciously misleading the police may constitute the federal criminal offence of obstructing an officer in the execution of his or her duty.[171]

Other reporting obligations and affirmative duties

School authorities should not create the impression that confidential student information will never be released. Aside from disclosure through police seizure and court proceedings, provincial law imposes several statutory obligations on educators to report information to provincial officials. Moreover, in some limited circumstances, an educator may face civil liability for failure to report certain information.

The *Education Act* imposes several different reporting obligations on school officials. For example, principals must report to the board and health officials any suspicions about infectious or contagious diseases in the school.[172] If a principal suspends a student, the reasons for the suspension must be reported to the student, the student's teachers, the student's parents or guardians, and to the board and other school officials.[173] Finally the Regulations provide that a principal must report any serious neglect of duty or infraction of a school rule to a minor student's parent or to the student if the student is an adult.[174]

The *Child and Family Services Act* requires teachers and principals to report any case of suspected child abuse.[175] The term abuse is broadly defined and the reporting obligation includes abuse that has occurred in the past.[176] Furthermore, this reporting obligation takes precedence over any conflicting provisions of other provincial statutes.[177] Consequently, despite the confidentiality and secrecy obligations of the *Education Act*, school officials must report any cases of suspected child abuse to the appropriate Children's Aid Society. Failure to do so constitutes a provincial offence.[178]

Traditionally, the law did not require an individual to control the conduct of another in order to protect that individual or others who may be foreseeably endangered.[179] In other words, the law did not make you your "brother's keeper". Nevertheless, the courts have recognized an increasing number of special relationships in which one party will be held civilly liable for the conduct of another.[180] It is well established that such a special relationship exists between school officials and students.[181]

Several challenging issues arise in applying these principles to alcohol- and drug-related situations. First, a civil action may be brought against a teacher for negligently allowing an intoxicated student to participate in activities that pose a foreseeable risk of injury.[182] This claim would likely succeed if the teacher had been negligent in failing to recognize that the student was impaired.

Second, a teacher may be sued for turning away or ejecting an intoxicated student who subsequently causes a car accident or other mishap. The court would likely consider whether the student was visibly intoxicated or known to be irresponsible, and whether the teacher should have realized that the student was driving and took reasonable steps to protect the student.

Finally, a teacher may become aware that a student's alcohol or drug problem poses a serious threat. If the student is in serious danger, the matter may have to be reported to the appropriate Children's Aid

"The courts have recognized special relationships in which one party will be held civilly liable for the conduct of another. It is well established that such a special relationship exists between school officials and students."

Society, even if the teacher had obtained the information in confidence. However, if the student is 16 years of age or older, this reporting obligation under the *Child and Family Services Act* would not apply.[183] The teacher is faced with a difficult choice in this situation. In order to protect the student, the teacher may have to breach his or her promise of confidentiality and the confidentiality provisions of the *Education Act*. Although it is possible, it is most unlikely that a teacher would be sued civilly or prosecuted for breaching a student's confidence in making an honest and reasonable attempt to protect him or her from an immediate threat.

If, in the alternative, the teacher complies with the *Education Act* and honours his or her confidentiality obligations and the student is injured, the teacher may be sued civilly for failing to protect the student. Although there have been several successful suits against American health-care professionals for failing to act in these types of circumstances,[184] there have been no comparable suits in Canada. While there is no clear legal answer, it is likely best to intervene and err on the side of student safety.

6 Schools, Courts, and the Charter of Rights and Freedoms: The Case of R. v. J.M.G.

In the previous sections, we examined educators' rights, powers and obligations separately under the Education Act, *the* Trespass to Property Act, *the* Criminal Code, *other statutes, and the common law. We have changed the approach in this section to focus on a specific case, namely* R. v. J.M.G.[185] *— one of the few appeal court cases in the area. This case is important, because it illustrates the relationship between educators' various powers, explains the impact of the* Charter, *and suggests that the courts will give school officials a relatively free hand under the* Education Act *to respond to alcohol and drug problems.*

Facts and issues in *R. v. J.M.G.*

In this case, the principal was told that a student, identified in the law report as J.M.G., was seen putting drugs in his sock just prior to class. The principal contacted a police officer and another principal for advice on how to handle the matter. The principal then went to J.M.G.'s class and asked him to come to the office. Once in his office, the principal informed J.M.G. of the allegation and requested that he remove his shoes and socks. During this process, J.M.G. managed to swallow a hand-rolled cigarette which was presumed to contain marijuana. However, some marijuana wrapped in foil was seized from J.M.G.'s sock or pant leg. It was only after J.M.G. swallowed some of the evidence that the principal decided to hand the case over to the police. The principal called the police, who arrested J.M.G. for possession of a narcotic and informed him of his right to counsel.[186]

J.M.G. was tried under the provisions of the *Young Offenders Act*,[187] convicted, and fined $25. He appealed to the Divisional Court which overturned the conviction on the basis that the marijuana had been seized in violation of the *Charter* and was inadmissible in evidence. The prosecutor appealed the Divisional Court's decision to the Ontario Court of Appeal.

The Court of Appeal had to resolve three issues. First, did the principal violate section 8 of the *Charter* which prohibits unreasonable search and seizure? Second, did the principal violate section 10(b) of the *Charter* by detaining J.M.G. without informing him of his right to counsel? Third, if J.M.G.'s rights were violated, should the marijuana that was seized be excluded from evidence? Section 24(2) of the *Charter* requires that evidence seized in violation of the *Charter* be excluded if its admission into evidence would, in all of the circumstances of the case, bring the administration of justice into disrepute. In resolving these issues, the Court of Appeal discussed at length the powers of school officials under the *Education Act*.

A principal's powers of investigation

The Court stated that the *Education Act* imposed on the principal a duty to maintain order and discipline and that he would have breached this duty if he had ignored the allegation. The principal might also have breached his duty if he had called in the police at this point without investigating the matter himself. The Court clearly expected school officials to

"The principal was told that a student was seen putting drugs in his sock just prior to class."

use their judgment in deciding whether to involve the police in minor offences and viewed some drug offences as falling within this category.

> *With respect to the nature of the infraction, it is suggested that the principal should have turned the whole matter over to the police upon his initial receipt of the report. There may indeed be circumstances where that would be advisable. For instance, the crime might be so obvious and so heinous that police participation was inevitable. But those circumstances did not exist here. There was no indication of the extent of the crime; nor was there any certainty that an offence had actually occurred....*
>
> *...In my view, calling the police initially would have been quite unnecessary and might even have amounted to a dereliction of duty. The offence was a very serious breach of discipline but in an absolute sense, as the small fine would indicate, it was not a crime of great magnitude. A principal has a discretion in many minor offences whether to deal with the matter himself, whether to consult the child's parents and whether to call in the law enforcement authorities. He cannot exercise that discretion until he knows the nature and extent of the offence.*[188]

Thus, it was incumbent upon the principal to investigate the allegation and then decide on an appropriate course of conduct. As far as the Court of Appeal was concerned, the principal was exercising his investigatory powers under the *Education Act* in bringing J.M.G. to his office, requesting that he remove his shoes and socks, and seizing the marijuana.[189] This characterization of the principal's conduct as an internal disciplinary matter greatly influenced the Court's analysis of the other issues. The Court clearly recognized an educator's authority to discipline students for violations of the school rules that also happen to constitute criminal offences.

Was the search unreasonable?

The Court emphasized that the principal searched J.M.G. as part of his effort to confirm or negate an allegation, which he had a duty to investigate. A credible allegation had been made against an individual student concerning a specific offence. The case did not involve random search or speculation about a student who was thought to be involved in drug use. The search served a legitimate purpose, was founded on reasonable grounds, was conducted in a reasonable fashion, and was not overly intrusive.[190] On this basis, the Court concluded that the search was "eminently reasonable", and thus did not violate section 8 of the *Charter*.

"The Court emphasized that the principal searched J.M.G. as part of his effort to confirm or negate an allegation, which he had a duty to investigate."

Did the principal violate J.M.G.'s right to counsel?

Section 10(b) of the *Charter* provides that "everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right." The Court of Appeal concluded that the principal did not arrest or detain J.M.G., at least not in the sense meant by the *Charter*. It reasoned that J.M.G. was already under a detention of sorts by virtue of his school attendance. The Court stated at page 284:

> *He was subject to the discipline of the school, and required by the nature of his attendance to undergo any reasonable disciplinary or investigative procedure. The search here was but an extension of normal discipline such as, for example, the requirement to stay after school or to do extra assignments or the denial of privileges.*

This form of detention under the *Education Act* was distinguished from detention that arises following arrest or other criminal proceedings. The principal had not changed J.M.G.'s status or the nature of his detention in taking him to the office and searching him. Since J.M.G. was not detained, in the sense meant by the *Charter*,[191] the principal was not required to inform him of his right to counsel.[192]

Outcome in R. v. J.M.G.

Since the Court held that the principal had not violated J.M.G.'s rights, section 24(2) of the *Charter* was inapplicable and the marijuana was admissible. Consequently, the Court of Appeal overturned the decision of the Divisional Court and restored the conviction and the sentence that was imposed at trial.

J.M.G. subsequently applied to the Supreme Court of Canada to hear an appeal, but it dismissed his application.[193] Thus, the Court of Appeal's decision remains the highest authority on these issues.

7 Conclusion

The purpose of this material is to identify the legal issues and explain the legal principles that underlie a school alcohol and drug policy. Our analysis indicates that school officials have ample legal authority to implement such a policy. It is clear that the current law, rather than constituting an obstacle, provides strong support for these types of initiatives.

Nevertheless, certain approaches seem to generate fewer legal difficulties than others. In many situations there is overlapping authority, and school officials can often respond to an issue or incident either under the *Education Act* or under the more formal powers of the *Criminal Code*, the *Trespass to Property Act* or other penal legislation. In such situations, it is generally advisable for school officials to rely on the *Education Act*, rather than to resort to penal legislation.

There are five reasons for adopting this approach:

- First, Canadian courts have broadly interpreted and applied the provisions of the *Education Act*, whereas there is an established tradition of interpreting penal legislation narrowly in the interests of the accused.
- Second, educators are much more likely to understand what is expected of them under the *Education Act* than to appreciate the finer points of other less familiar legislation.
- Third, as the cases of *R. v. J.M.G.* and *R. v. Lerke* illustrate, a principal acting pursuant to the *Education Act* will not face the same *Charter* problems as a principal acting pursuant to penal legislation.
- Fourth, in addition to complying with the *Charter*, a principal or teacher who arrests a student must call in the police. Once the police are involved, they are responsible for deciding how the case will be handled.
- Finally, if educators rely too heavily on their penal authority, they are put in an adversarial position with their students. This may undermine the prevention and early intervention components of their alcohol and drug policy.

It is appropriate at this point to return to our basic theme. The current law enables educators to respond to alcohol and drug problems in the school. Although some of the legal issues are complex, there are no major legal obstacles to implementing the three components of a comprehensive alcohol and drug policy. The real challenge for educators is to use their legal authority with restraint in an effort to balance these three components, while maintaining the type of positive educational environment which is essential to the policy's overall success.

"It is generally advisable for school officials to rely on the Education Act, rather than to resort to penal legislation."

Endnotes

1. R.S.O. 1980, c. 129.

2. R.S.O. 1980, c. 511.

3. R.S.C. 1985, c. C-46.

4. *Education Act*, s. 235; and Regulation 262, R.R.O. 1980, as amended and consolidated to July 1989, s. 21.

5. *Education Act*, s. 236; and Regulation 262, s. 12.

6. *Education Act*, ss. 235(1)(c) and 236.

7. *Ibid.*, s. 235(1)(b).

8. *Ibid.*, s. 236(j); and Regulation 262, s. 12(3)(e), and (f) and s. 21(g).

9. *Education Act*, ss. 236(a) and 235(1)(e).

10. *Ibid.*, s. 236(a); and Regulation 262, s. 12(2)(a) and (b).

11. *Education Act*, s. 235(1)(e). See also *R. v. Trynchy* (1970), 73 W.W.R. 165 (Yukon Mag. Ct.), in which it was held that the power to discipline extends to the driver of the school bus.

12. Reg. 262, s. 23(1)(b) and (c), and (4).

13. The Canadian courts have been reluctant to question or limit the powers of school officials to maintain order and discipline. See for example, *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.), which is discussed in Chapter 6 of this text. See also *R. v. Sweet* (1986), unreported (Ont. Dist. Ct.); and *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.).

14. In *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.), the Court stated at page 283:
    > First, the principal has a substantial interest not only in the welfare of the other students but in the accused student as well. Secondly, society as a whole has an interest in the maintenance of a proper education environment, which clearly involves being able to enforce school discipline efficiently and effectively.

15. *Education Act*, ss. 149(8), 236(j); and Regulation 262, s. 12(3)(k) and (l).

16. *Education Act*, ss. 168-172; and Regulation 262, s. 12(3)(l). In its capacity as the owner, a school board probably also has the right to authorize the police to search student lockers.

17. See for example, *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.); and *R. v. Sweet* (1986), unreported (Ont. Dist. Ct.).

18. In both *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.) and *R. v. Sweet* (1986), unreported (Ont. Dist. Ct.), the court emphasized that the school officials had reasonable grounds to suspect the student of violating the law.

19. *Education Act*, s. 20(1) and (2).

20. *Ibid.*, ss. 20(5) and 29(1) and (2). See *R. v. K. Prentice* (1984), 14 W.C.B. 39 (Ont. Prov. Ct.).

21. *Ibid.*, s. 29(5).

22. *Ibid.*, s. 25(1).

23. *Ibid.*, s. 22(1).

24. Reg. 262, s. 23(2).

25. *Ibid.*, s. 236(m); and *R. v. Burko* (1968), 3 D.L.R. (3d) 330 (Ont. Mag. Ct.). The principal's decision is subject to an appeal to the board.

26. This denial of entry could also be justified on the students' duty to comply with reasonable rules of comportment and behaviour. See Reg. 262, s. 23(1)(b) and (c).

27. The right to deny entry, the power to control curriculum and teaching materials, and the duty to instill regard for "sobriety, temperance, and all other virtues" could be used for censorship purposes. Traditionally, the Canadian courts have adopted a hands-off policy in regard to education policies and practices. However, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act*, 1982 (U.K.), c. 11, guarantees everyone certain rights and freedoms. These include: freedom of thought, belief, opinion, and expression; freedom of peaceful assembly; and freedom of association. The use of the *Education Act* for censorship purposes will inevitably be challenged under the *Charter*, and will likely generate other legal and administrative problems. See J. Wilson, *Children and the Law*, 2nd ed., Toronto: Butterworths and Co. (Can) Ltd., 1986, pp. 438-439.

28. *Education Act*, s. 22(1). For cases involving suspension orders, see *Finlayson and Tucker v. Powell*, [1926] 1 W.W.R. 939 (Alta. C.A.); *Ruman v. Board of Trustees of Lethbridge School District*, [1943] 3 W.W.R. 340 (Alta. S.C.); *Ward v. Board of Blaine Lake School*, [1971] 4 W.W.R. 161 (Sask. Q.B.); and *Warnock v. Board of School Trustees of Penticton* (1979), 17 B.C.L.R. 374 (S.C.).

29. The fixed period of the suspension and the student's legal right to return once the suspension is over prevent a principal from suspending a student until he or she agrees to accept a referral to an addictions agency or to enter treatment.

30. *Education Act*, s. 22(1).

31. *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 38(1).

32. *Ibid.*, s. 22(2).

33. *Ibid.*

34. *Ibid.*, s. 22(3). In *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.), the court held that the Board was entitled to expel a student after it concluded he had been selling drugs to other students, even though the student had not been convicted. The board's conduct was justified on the basis that it had a duty to take action to protect the students under its care. See also *Bouchard v. Commissaires d'Ecoles de St. Mathieu de Dixville*, [1949] Que. K.B. 30; aff'd. [1950] S.C.R. 479.

35. In *Re Peel Board of Education and B* (1987), 59 O.R. (2d) 654 (H.C.), the judge indicated that a student's behavior could not be considered "refractory" unless it involved a series of misdeeds. But see *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.), which does not limit the term "refractory" to repeated misbehavior.

36. *Education Act*, s. 22(3). It should be noted that disciplinary proceedings are generally open to the public. However, the Act and other legislation permits these hearings to be closed in order to avoid the disclosure of intimate, personal, or financial information. *Education Act*, s. 183(1) and (1a); and *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, s. 9.

37. *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.); *Warnock v. Board of School Trustees of School District #15 (Penticton)* (1979), 17 B.C.L.R. (S.C.); *R. v. Sweet* (1986), unreported (Ont. Dist. Ct.); and *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

38. (1987), 59 O.R. (2d) 654 (H.C.).

39. R.S.C. 1985, c. Y-1.

40. *Re Peel Board of Education and B* (1987), 59 O.R. (2d) 654 at 661 (H.C.). The judge was equally critical of the Board's conduct.

41. *Ibid.*, pp. 659-660.

42. Indeed, a teacher could not even tell his or her principal about the incident without violating the broad interpretation of section 38(1).

43. See for example, *C.T. and J.T. v. Board of School Trustees of School District 35 (Langley)* (1985), 65 B.C.L.R. 197 (C.A.); *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.); and *H. (G.) v. Shamrock Sch. Div. No. 38 (Sask.) Bd of Educ.*, [1987] 3 W.W.R. 270 (Sask. Q.B.).

44. (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

45. The former Ontario government introduced a Bill that contained significant amendments to the *T.P.A.* It has been suggested that the current government may re-introduce the Bill. However, the proposed changes are unlikely to have a detrimental effect on a board's alcohol and drug policies or their enforcement. Bill 149, *Trespass to Property Amendment Act*, 2d Sess., 34th Leg. Ont., 1989. (2d Reading, Feb. 14, 1989).

46. R.S.O. 1980, c. 511, s. 1(2).

47. *Ibid.*, s. 2(1).

48. *Ibid.*, s. 5. Posting a sign at only one of several entrances may be insufficient. *Evans v. Latulippe* (1990), 20 A.C.W.S. (3d) 1087 (Ont. Div. Ct.).

49. *T.P.A.*, s. 3(1)(b).

50. *Ibid.*, s. 4(1).

51. *Ibid.*, s. 2.

52. *Education Act*, s. 20(1).

53. *Ibid.*, ss. 31, 32, and 39.

54. *Ibid.*, s. 20(2)(f); and Regulation 262, s. 23.

55. For example, the *Education Act* requires school officials to maintain order and discipline and to safeguard student health and safety. See ss. 235(1)(e), 236(a), and 236(j). Consequently, any reasonable restrictions on entry that are designed to prevent the commission of illegal acts and to protect students would be warranted. As the following cases illustrate, the Canadian courts have been very supportive of school officials' efforts to deal with student drug use. See *Wilkes v. Municipal School Board of the County of Halifax* (1978), 26 N.S.R. (2d) 628 (S.C.); *R. v. Sweet* (1986), unreported (Ont. Dist. Ct.); and *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

56. See Chapter 6 for a discussion of s. 8 of the *Charter* which guarantees everyone the right not to be subject to unreasonable search and seizure.

57. *Trespass to Property Act*, s. 9(1).

58. *Ibid.*, s. 9(2).

59. *R. v. Lerke* (1986), 25 D.L.R. (4th) 403 (Alta. C.A.).

60. R.S.C. 1970, c. N-1, s. 3.

61. *The Charter*, s. 8. The leading case on section 8 is *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.). See also *R. v. Therens*, [1985] 1 S.C.R. 613; *Collins v. The Queen*, [1987] 1 S.C.R. 265; and *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257 (S.C.C.).

62. *The Charter*, s. 9. See *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Hufsky*, [1988] 1 S.C.R. 621; and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

63. *The Charter*, s. 10(a). See *R. v. Kelly* (1985), 7 O.A.C. 46 (Ont. C.A.); *Campbell v. Hudyma*, [1986] 2 W.W.R. 44 (Alta. C.A.); and *R. v. Ancelet*, [1986] 4 W.W.R. 761 (Alta. C.A.).

64. *The Charter*, s. 10(b). See *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Clarkson* (1986), 66 N.R. 114 (S.C.C.); and *R. v. Black*, [1989] 2 S.C.R. 138.

65. *Ibid.*

66. For a discussion of section 24(2), see *R. v. Therens*, [1985] 1 S.C.R. 613; *Collins v. The Queen*, [1987] 1 S.C.R. 265; and *R. v. Black*, [1989] 2 S.C.R. 138.

67. See infra Chapter 6 and the accompanying notes.

68. *Criminal Code*, ss. 40-42.

69. *MacDonald v. Hees* (1974), 46 D.L.R. (3d) 720 (N.S.S.C); *Brown v. Wilson* (1975), 66 D.L.R. (3d) 295 (B.C.S.C.); and *Cullen v. Rice* (1981), 120 D.L.R. (3d) 641 (Alta. C.A.).

70. *Ibid.*, and *Criminal Code*, ss. 40-41.

71. For example, in *R. v. Figueira* (1981), 63 C.C.C. (2d) 409 (Ont. C.A.), the court held that section 41 of the *Criminal Code* in itself could not justify stabbing a trespasser to prevent him or her from entering. See also *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.). For common law authority, see *Bigcharles v. Merkel*, [1973] 1 W.W.R. 324 (B.C.S.C.); *Veinot v. Veinot* (1977), 31 A.P.R. 630 (N.S.S.C.); and *Pynch, Pynch and Atwell v. Smith* (1977), 24 A.P.R. 372 (N.S.C.A.).

72. See *Dunn v. Dominion Atlantic Ry. Co.*, [1920] 2 W.W.R. 705 (S.C.C.); and *Arbeau v. Dalhousie Tavern Ltd.* (1974), 9 N.B.R. (2d) 625 (S.C.).

73. *Jordan House Ltd. v. Menow and Honsberger*, [1974] S.C.R. 239.

74. For a discussion of the duty of care imposed upon school officials, see *Magnusson v. Board of the Nipawan School* (1975), 60 D.L.R. (3d) 572 (Sask. C.A.); *Myers v. Peel County Board of Education* (1981), 123 D.L.R. (3d) 1 (S.C.C.); and J. Barnes, "Tort Liability of School Boards to Pupils" in L. Klar (ed.), *Studies in Canadian Tort Law*, Toronto: Butterworths and Co. (Can.) Ltd., 1977, p. 189.

75. *Ibid.*

76. Similar obligations were imposed on a tavern owner to protect one of his intoxicated patrons. See *Jordan House v. Menow and Honsberger*, [1974] S.C.R. 239.

77. See also the *Criminal Code*, s. 449(2) which authorizes owners, people in lawful possession or those acting on their behalf to arrest without a warrant anyone found apparently committing a criminal offence on or in relation to the property.

78. See notes 68 to 71.

79. *Trespass to Property Act*, s. 2(1).

80. *Ibid.*, s. 12(1).

81. See for example, *Turner v. Thorne*, [1960] O.W.N. 20 (H.C.); *Pretu v. Donald Tidey Co. Ltd.* (1965), 53 D.L.R. (2d) 504 (Ont. H.C.); and *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.). It should be noted that if the trespasser acts in a high-handed, malicious or otherwise outrageous manner the court may award the plaintiff substantial punitive damages. This is aptly illustrated by the *Pretu* and *Nantel* cases.

82. *T.P.A.*, s. 12(2).

83. *Criminal Code*, ss. 494(1)(a) and (2).

84. *Criminal Code*, s. 494(1)(a) states that: "anyone may arrest without warrant a person whom he finds committing an indictable offence." However, the Supreme Court of Canada has interpreted the phrase "finds committing" to mean "finds apparently committing". *R. v. Biron* (1976), 59 D.L.R. (3d) 409 (S.C.C.). Although *Biron* dealt with section 495, this same broad interpretation of the phrase "finds committing" should apply to section 494(1)(a). See *Besse v. Thom* (1979), 96 D.L.R. (3d) 657 (B.C. Co. Ct.); and *R. v. Cunningham and Ritchie* (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.).

85. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a); *R. v. Seward*, [1966] 4 C.C.C. 166 (Yukon Mag. Co.); and *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.).

86. *Criminal Code*, s. 494(2).

87. See *R. v. Pollard* (1917), 39 D.L.R. 111 (Alta. C.A.); *R. v. Suchacki*, [1924] 1 D.L.R. 971 (Man. C.A.); and *R. v. Seward*, [1966] 4 C.C.C. 166 (Yukon Mag. Co.).

88. *Criminal Code*, s. 175.

89. R.S.C. 1985, c. T-9, s. 4.

90. *Criminal Code*, s. 494(3). The term "forthwith" has been interpreted to mean as soon as it is reasonably practical under all the circumstances. *R. v. Cunningham and Ritchie* (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.).

91. The classic cases in this area are *Semayne's Case* (1604), 77 E.R. 194 (K.B.); *Money v. Leach* (1765), 19 How. St. Tr. 1002 (K.B.); and *Entick v. Carrington* (1765), 95 E.R. 807 (K.B.).

92. *Leigh v. Cole* (1853), 6 Cox C.C. 329 (Q.B.); *Mayer v. Vaughan* (No. 2) (1902), 6 C.C.C. 68 (Que. K.B.); *Gottschalk v. Hutton* (1921), 66 D.L.R. 499 (Alta. C.A.); *Re Laporte and The Queen* (1972), 29 D.L.R. (3d) 651 (Que. Q.B.); and *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257 (S.C.C.).

93. *Criminal Code*, s. 494(3).

94. For example, in *R. v. Lerke* (1986), 25 D.L.R. (4th) 403 (Alta. C.A.), the Court held that the staff of the tavern had lawfully arrested the accused, but then violated section 8 of the *Charter* in searching him. As a result, the marijuana which the staff seized had to be excluded from evidence and the accused was acquitted. The Court's comments about private citizens' powers of search on pages 413-414 are relevant to school officials:

> A citizen may, on occasion, have greater need of a right to search than does the peace officer...The citizen has neither side-arm, badge nor uniform, let alone warrant, on which to rely. He lacks the coercive presence of these attributes of authority which help the peace officer to avoid violence. The right to search, at least to disarm, is essential.
>
> . . .
>
> Where the search is not for weapons, but only to seize or preserve property connected to the offence, different considerations apply. The urgency present in the search for weapons would not ordinarily be present in those cases. Often the triviality of the offence charged or the improbability, in the circumstances, that any evidence will be uncovered, or will be destroyed even if search is delayed, will mean that search by a citizen would not be a reasonable search. Both the *Petty Trespass Act* and s. 449 of the *Criminal Code* contemplate that the offender will be turned over to persons in authority without delay. That being the case, it will be rare that the citizen making an arrest will need to search for evidentiary purposes only. The course of wisdom and the requirement that the search be reasonable will usually dictate that the search for evidence be left until the person arrested is turned over to authority.

95. *Criminal Code*, s. 34.

96. *Ibid.*, s. 34(1); and R. v. McQuarrie (1944), 81 C.C.C. 20 (Sask. C.A.).

97. *Criminal Code*, s. 265(1).

98. See *R. v. Baxter* (1975), 33 C.R.N.S. 22 (Ont. C.A.); and *Martin v. R.* (1985), 47 C.R. (3d) 342 (Que. C.A.).

99. *Criminal Code*, s. 34(1). The issue of what constitutes reasonable force is based on the specific facts of each case. See for example, *R. v. Antley*, [1964] 2 C.C.C. 142 (Ont. C.A.); *R. v. Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.); and *R. v. Deegan* (1979), 49 C.C.C. (2d) 417 (Alta. C.A.).

100. *R. v. Matson* (1970), 1 C.C.C. (2d) 374 (B.C.C.A.).

101. *Criminal Code*, s. 34(2); *R. v. Bogue* (1976), 30 C.C.C. (2d) 403 (Ont. C.A.); *R. v. Deegan* (1979), 49 C.C.C. (2d) 417 (Alta. C.A.); *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.); and *R. v. Clark*, [1983] 4 W.W.R. 313 (Alta. C.A.).

102. *Criminal Code*, s. 37.

103. *Ibid.*, s. 27. Many of the principles concerning self-defence are equally applicable to s. 27.

104. *Ibid.*, s. 27(a)(ii).

105. See for example, *R. v. Metcalfe*, [1927] 3 W.W.R. 194 (Sask. Dist. Co.); *R. v. Corkum*, [1937] 1 D.L.R. 79 (N.S.Co.Ct.); *Murdock v. Richards*, [1954] 1 D.L.R. 766 (N.S.S.C.); and *R. v. Imbeault* (1977), 17 N.B.R. (2d) 234 (Co. Ct.).

106. *R. v. Haberstock* (1970), 1 C.C.C. (2d) 433 (Sask. C.A.).

107. *Ogg-Moss v. The Queen* (1984), 11 D.L.R. (4th) 549 (S.C.C.); and *Nixon v. The Queen* (1984), 12 D.L.R. (4th) 762 (S.C.C.). See also *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.).

108. *Ogg-Moss v. The Queen* (1984), 11 D.L.R. (4th) 549 (S.C.C.), at p. 566, quoting *Brisson v. Lafontaine* (1864), 8 L.C. Jur. 173, at p. 175.

109. See J. Wilson, *Children And The Law*, 2nd ed., Toronto: Butterworths and Co. (Can.) Ltd., 1986, pp. 436-437.

110. *Priestman v. Colangelo and Smythson* (1959), 19 D.L.R. (2d) 1 (S.C.C); *Poupart v. Lafortune* (1973), 41 D.L.R. (3d) 720 (S.C.C.); *R. v. Biron* (1976), 59 D.L.R. (3d) 409 (S.C.C.), per Laskin C.J.C., at 411; and *Moore v. Slater* (1979), 101 D.L.R. (3d) 176 (B.C.S.C.).

111. For example, in *Fraser v. Evans*, [1969] 1 Q.B. 349 (C.A.), the court stated at page 361:

> No person is permitted to divulge to the world information which he had received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless once he gets to know that it was originally given in confidence, he can be restrained from breaking that confidence.

See also *Parry-Jones v. The Law Society and Others*, [1968] 1 All E.R. 177 (C.A.); *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.); and *Cronkwright v. Cronkwright* (1971), 14 D.L.R. (3d) 168 (Ont. H.C.).

112. S.O. 1984, c. 55, s. 69(3).

113. For other examples, see the *Mental Health Act*, R.S.O. 1980, c. 262, s. 29; and Regulation 865, R.R.O. 1980. s. 49 to the *Public Hospital Act*, R.S.O. 1980, c. 410.

114. For example, a teacher who agreed to meet with a student to discuss a "private and personal matter" may be viewed as having implicitly promised confidentiality.

115. In most professional relationships, such as those with lawyers, health care professionals, accountants, and engineers, it is simply assumed that all patient or client information is confidential.

116. See for example, s. 64 of the *Mental Health Act*, as amended, which provides that any violation of the Act or Regulations is a provincial offence punishable by a fine of up to $25,000.

117. See H. Glasbeek, "Limitations on the Action of Breach of Confidence" in D. Gibson (ed.), *Aspects of Privacy Law*, Toronto: Butterworths and Co. (Can.) Ltd., 1980, p. 217; and S. Rodgers-Magnet, "Common Law Remedies for Disclosure of Confidential Medical Information" in F. Steel and S. Rodgers-Magnet (eds.), *Issues in Tort Law*, Toronto: The Carswell Company Ltd., 1983, p. 265.

118. The legislation governing most professionals specifically provides that the wrongful disclosure of confidential information constitutes professional misconduct and may result in disciplinary proceedings. See for example, R.R.O. 1980, Reg. 448, s. 27(22) to the *Health Disciplines Act*, R.S.O. 1980, c. 196; and the *Teaching Professions Act*, R.S.O. 1980, c. 495, s. 12(a) and Regulation 435, R.O.C. 1985, s. 14(c).

119. For a comprehensive review of privilege, see P. McWilliams, *Canadian Criminal Evidence*, 2nd ed., Aurora: Canada Law Book Limited, 1984, pp. 915-924 and 963-976.

120. *Ibid.* pp. 920-924. See also B. McLachlin, "Confidential Communications and the Law of Privilege" (1977), 11 *U.B.C. L. Rev.* 266; and H. Glasbeek, "Limitations on the Action of Breach of Confidence" in D. Gibson (ed.), *Aspects of Privacy Law*, Toronto: Butterworths and Co. (Can.) Ltd., 1980, p. 217.

121. *Ibid.* See also *Slavutych v. Baker*, [1976] 1 S.C.R. 254.

122. See for example, *R. v. R.S.* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.); *Gibbs v. Gibbs* (1985), 1 W.D.C.P. 6 (Ont. S.C.); and *R. v. Worth* (1989), 54 C.C.C. (3d) 215 (Ont. H.C.).

123. Ontario, Ministry of Education, *Ontario Student Record (OSR) Guideline 1989*, (1989). The Guideline was issued in 1989, but only came into force on January 1, 1991.

124. Bill 30, *Education Amendment Act (Miscellaneous)*, 1990, 1st. sess., 35th Leg. Ont., 1990 (1st Reading, Dec. 17th, 1990).

125. See Reg. 271, R.R.O. 1980, as amended by O. Reg. 380/86.

126. Although Reg. 271, R.R.O. 1980, s. 5(2) limited an educator's right to maintain records outside of the OSR, this section was repealed by O. Reg. 380/86, s. 2. Consequently, the current regulations no longer contain any express provisions concerning records kept outside of the OSR. However, any such records would be subject, like the OSR, to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, S.O. 1989, c. 63.

127. Reg. 271, s. 2.

128. The *Ministry Guideline*, s. 10.3, provides that reports from third parties, which presumably would go in the documentation file of the OSR, can only be included if the principal has received the written consent of a minor student's parents or of the student if he or she is an adult. If consent is not obtained, the principal notes that he has received the report in Part H of the OSR and returns the document to the third party or destroys it. As in the case of the rest of the OSR, the documentation file is limited to information that the principal believes is conducive to improving the instruction of the student.

129. Reg. 271, s. 25; and *Ministry Guideline*, s. 34.

130. (1987), 59 O.R. (2d) 654 (H.C.).

131. From a strictly technical point of view, s. 237(13) of the *Education Act* would prevail over any inconsistent provisions in the Regulations or *Ministry Guideline*. Similarly, the position adopted by the Court of Appeal in *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 stands in sharp contrast to that in *Re Peel Board of Education and B* (1987), 59 O.R. (2d) 654 (H.C.) and would prevail over it. Thus, it may still be lawful to record disciplinary infractions in the OSR. Nevertheless, the Ministry's intent is obvious and its concerns are most reasonable.

132. The regulations and *Ministry Guideline* would only prohibit recording of infractions that were governed by the *YOA* or Part V-A of the *Provincial Offences Act*. Thus, the less serious infractions that do not violate the law could be recorded. This creates a somewhat anomalous situation, in that the more serious infractions — the ones that should be of greatest concern to educators — are the ones that cannot be recorded. This state of affairs does not appear to be consistent with the general duties of educators to maintain order and discipline in the school, and to preserve and protect student health and safety.

133. See note 126.

134. *Education Act*, s. 237(10). See also s. 237(2).

135. *Ibid.*, s. 237(2), (10)(b) and (c). It should be noted that a student is a minor if he or she is under the age of 18.

136. *Ibid.*, s. 237(3).

137. *Ibid.*, s. 237(4)(a).

138. *Ibid.*, s. 237 (4)(b). The Act sets out detailed procedures for resolving disputes about the accuracy or appropriateness of the information in the record. *Ibid.*, s. 237(5).

139. It is important to distinguish between a situation in which the police are demanding, as opposed to requesting information. As stated in the *Ministry Guideline* at s. 4.4.3: "If a school principal is served with a search warrant requiring the surrender of an OSR to the police, the principal is obliged to comply with the warrant. Likewise, if a principal is served with a subpoena requiring his or her testimony in a criminal case, he or she is obliged to comply with the subpoena and produce the OSR if required."

140. It should be noted that the Act's confidentiality provisions apply only to information that properly belongs in the OSR. For example, in *Cook v. Dufferin-Peel Roman Catholic Separate School Board* (1983), 34 C.P.C. 178 (Ont. S.C.), it was held that students' statements concerning injuries to another student should not have been included in the students' OSR, because this information was not relevant to their instruction.

141. *Education Act*, s. 237(2).

142. *R. v. B.* (1979), 2(3) F.L.R. 213 (Ont. Prov. Ct.). See also *R. v. Snider*, [1954] S.C.R. 479.

143. *R. v. B.* (1979), 2(3) F.L.R. 213 (Ont. Prov. Ct.), at p. 218.

144. *Ibid.*, pp. 217-218.

145. As indicated earlier, the courts have been reluctant to extend privilege to various relationships and to interpret statutes as granting privilege. This attitude stems from a legitimate concern that privileged information, which may be important evidence, is unavailable to the courts. See generally, *R. v. Snider*, [1954] S.C.R. 479; *Gibbs v. Gibbs* (1985), 1 W.D.C.P. 6 (Ont. S.C.); and *R. v. B.* (1979), 2(3) F.L.R. 213 (Ont. Prov. Ct.).

146. S.O. 1989, c. 63.

147. *Ibid.*, s. 4(1).

148. *Ibid.*, ss. 6-15, 32.

149. *Ibid.*, s. 36.

150. Since it only came into force recently, it will be several years before the courts have an opportunity to interpret the legislation.

151. MFIPPA, s. 2(1) "record".

152. *Ibid.* See also s. 2(1) "personal information" which is defined as recorded information about an identifiable individual.

153. *Ibid.*, ss. 4(1) and 6-15.

154. *Ibid.*, ss. 6(1)(b), 8(1)(a) and (b), and 12 respectively.

155. *Ibid.*, s. 9.

156. *Ibid.*, s. 2(1) "personal information".

157. *Ibid.*, s. 14(1)(a).

158. *Ibid.*, s. 54 (c).

159. *Ibid.*, s. 14(1)(b).

160. *Ibid.*, s. 14(1)(d).

161. *Ibid.*, s. 14(1)(f). Section 14(2) provides that an individual must consider all relevant circumstances, including nine specific criteria, in determining what constitutes an unjustified invasion of privacy. Section 14(3) provides that disclosure of educational, medical, psychological, as well as other specified types of information is presumed to constitute an unjustified invasion of privacy. Consequently, it would appear that important countervailing considerations would have to be established to justify disclosing such information under this exception.

162. *Ibid.*, s. 27. The exact relationship between Parts I and II of the Act remain unclear. It should be noted as well that the definition of personal information in Part II of the Act includes information that has not been recorded. See s. 28(1).

163. *Ibid.*, s. 32(c), (d), (g) and (i) respectively.

164. *Ibid.*, s. 36(1).

165. *Ibid.*, s. 38.

166. *Ibid.*, s. 36(2).

167. *Ibid.*, s. 30(2).

168. *Ibid.*, ss. 39-44.

169. See for example, *Koechlin v. Waugh* (1957), 11 D.L.R. (2d) 447 (Ont. C.A.); *R. v. Carroll* (1959), 23 D.L.R. (2d) 271 (Ont. C.A.); *Rice v. Connolly*, [1966] 2 Q.B. 414; *Kenlin v. Gardiner*, [1967] 2 Q.B. 510; and *Colet v. The Queen*, [1981] 1 S.C.R. 2.

170. *Criminal Code*, s. 50(1)(b).

171. *Ibid.*, s. 118(a).

172. *Education Act*, s. 236(k).

173. *Ibid.*, s. 22(1). As previously discussed, this duty may conflict with the *YOA*, s. 38(1).

174. Regulation 262, s. 12(3)n.

175. S.O. 1984, c. 55, s. 68(3).

176. The definition of child abuse includes potential or actual physical harm, sexual molestation or exploitation, emotional harm, and lack of appropriate medical treatment. *Ibid.*, s. 37(2).

177. *Ibid.*, s. 68(3).

178. *Ibid.*, s. 81(1).

179. See C. Wright, "Negligent 'Acts or Omissions'" (1941), 19 *Can. Bar Rev.* 465; and H. McNiece and J. Thornton, "Affirmative Duties in Tort" (1949), 58 *Yale L.J.*, 1272.

180. See for example, *Jordan House Ltd. v. Menow and Honsberger*, [1974] S.C.R. 239; *Arnold v. Teno* (1978), 83 D.L.R. (3d) 609 (S.C.C.); *Toews v. MacKenzie* (1980), 109 D.L.R. (3d) 473 (B.C.C.A.); and *Q. v. Minto Management Ltd.* (1985), 49 O.R. (2d) 531 (Ont. H.C.), aff'd (1986), 34 D.L.R. (4th) 767 (Ont. C.A.).

181. See note 74.

182. In *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 44 C.C.L.T. 225, the Supreme Court of Canada unanimously held that sponsors of potentially dangerous activities have a legal obligation to take whatever steps are possible to prevent the intoxicated from participating. Although there are no comparable Canadian cases dealing with schools, the following cases clearly illustrate the courts' concern that students not be exposed to undue risk. *Myers v. Peel County Board of Education* (1981), 17 C.C.L.T. 269 (S.C.C.); *Hoar v. Board of School Trustees, District 68 (Nanaimo) and Haynes*, [1984] 6 W.W.R. 143 (B.C.C.A.); and *Papamonolopoulos v. Board of Education for the City of Toronto* (1986), 30 C.C.L.T. 82 (Ont. C.A.).

183. S.O. 1984, c. 55, ss. 3(1), 6 and 37(1)(a).

184. See J. Fleming, "The Patient and His Victim: The Therapist's Dilemma" (1974), 62 *Cal. L. Rev.* 1025; D. Salter, "The Duty To Warn Third Parties: A Retrospective on *Tarasoff*" (1986), 18 *Rutgers L. J.* 145; and S. Bednar, "The Psychotherapist's Calamity: Emerging Trends in the Tarasoff Doctrine", [1989] *Brigham Young Univ. L. Rev.* 261.

185. (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

186. *Ibid.*, pp. 279-280.

187. R.S.C. 1985, c. Y-1.

188. *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

189. The Court in *J.M.G.* simply assumed that the principal was entitled to possess the marijuana he seized from the student. The issue is complicated by the fact that possession of a narcotic is an offence under s. 3 of the *Narcotic Control Act*. Regulations to the *Narcotic Control Act* authorize certain individuals, including agents of the police, to possess narcotics in specified circumstances. See C.R.C. 1978, c. 1041, s. 3(2). Presumably, the Courts in *J.M.G.* and *R. v. Lerke* (1986), 25 D.L.R. (4th) 403 (Alta. C.A.) consider private citizens to be agents of the police when they seize drugs and contact the police to hand them over.

However, it is not clear what authority a principal has to possess drugs seized from a student and then dispose of them without calling in the police. Nevertheless, this is exactly what the Court in *J.M.G.* suggested would be appropriate in minor drug cases. Unfortunately, no court has specifically addressed the issue. In these circumstances, it may be advisable for a school board to contact the local crown prosecutor and the police to reach some informal agreement about how to handle these matters.

In any event, school boards should develop internal guidelines governing the seizure, possession, storage, and disposal of property that is taken from students. It may be appropriate to return to a student's parents any property that may be lawfully possessed by the parents, but may not be lawfully possessed by the student. Cigarettes taken from a 15-year-old and alcohol seized from a 16-year-old would fall into this category. Property which is taken from a student because of a violation of the school rules, but which the student may otherwise lawfully possess, could be returned to the student at the end of the term. This would include, for example, cigarettes taken from a 17-year-old student caught smoking in class. A school official should not return to students property that they cannot lawfully possess. For example, a principal who returned any alcohol to an 18-year-old student could be charged under s. 30(1) of the *Liquor Licence Act*, S.O. 1990, c. 15, with providing alcohol to a person who is underage. Nor should school officials use or consume any property seized from students. Regardless of the specific guidelines adopted, they should be compatible with the board's overall alcohol and drug policies.

190. *R. v. J.M.G.* (1986), 33 D.L.R. (4th) 277 (Ont. C.A.).

191. *Ibid.*, p. 284.

192. However, the Court suggested that the result might have been different had the principal arrested J.M.G. and then brought him to the office, or had he called in the police immediately and held J.M.G. until they arrived. In these situations, the principal would probably be viewed as an agent of the police and thus subject to the provisions of the *Charter*. Moreover, the principal would probably be required to comply with various obligations under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, ss. 11 and 56. The Court emphasized that the principal only decided to involve the police after J.M.G. swallowed part of the evidence. Nevertheless, from the suspect's perspective it is difficult to justify distinguishing between an investigation of potentially criminal conduct under the *Education Act* to which s. 10(b) would not apply, and a citizen's arrest or detention to which s. 10(b) would apply.

193. *R. v. J.M.G.* (1987), 59 O.R. (2d) 286 (S.C.C.).